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No. 96-1459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ERIC PEDEN AND SHARON L. SMITH,
for themselves and all others similarly situated,
Petitioners,

v.

STATE OF KANSAS, KANSAS DEPARTMENT OF REVENUE, NANCY PARRISH, Secretary of Revenue of the State of Kansas, and ALISA DOTSON, Director of Taxation of the State of Kansas,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Kansas

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Kansas' income tax code, which imposes different tax rates upon married taxpayers filing joint returns than upon individual filers, satisfies the rational basis test of the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Kansas Supreme Court were the same as those named in the caption.

Pursuant to this Court's Rule 35.3, respondents note the following: Nancy Parrish and Alisa Dotson, who are named as respondents in the caption, were sued in their official capacities as Secretary of Revenue and Director of Taxation, respectively. Neither Ms. Parrish nor Ms. Dotson holds these positions at present. Kansas' current Secretary of Revenue is John LaFaver; the position of Director of Kansas' Division of Taxation is currently vacant; at present, Secretary LaFaver also holds the position of acting Director of Taxation.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners ask this Court to determine whether the Kansas Supreme Court correctly held that, applying rational basis review, Kansas' income tax rates do not violate the Equal Protection Clause of the Fourteenth Amendment. There is no conflict between the decision below and the decision of any other court. The decision of the Kansas Supreme Court constitutes a routine application of well-established equal protection principles and does not merit this Court's review. In any event, the statute has recently been repealed by the Kansas legislature.

STATEMENT

The background of this case is as follows:

The Tax At Issue. The State of Kansas imposes a tax upon "the Kansas taxable income of every resident individual." Kan. Stat. Ann. § 79-32,110(a) (1996 Supp.). Under Kansas law, individual income tax filers pay income tax based upon their own Kansas taxable income; married couples who elect to file a joint return have their Kansas taxable income determined "as if husband and wife were one individual taxpayer." Kan. Stat. Ann. § 79-32,115(a) (1989).[1]

The Kansas Income Tax Act ("KITA") is fashioned after, and in large part dependent upon, the Federal income tax return. *See, e.g.*, Kan. Stat. Ann. § 79-3221(a) (1996 Supp.); Kan. Stat. Ann. 79-32,109(a) (1989). A taxpayer's "Kansas taxable income" is calculated using Federal adjusted gross income as a base, and making certain additions and subtractions to arrive at Kansas adjusted gross income. Kan. Stat. Ann. § 79-32,117(a)-(d) (1996 Supp.). Kansas taxable income is ultimately calculated by subtracting Kansas deductions and personal exemptions from Kansas adjusted gross income.

For the tax years at issue in this case (1988 to 1996), KITA contained two sets of tax rate schedules. Pet. App. 6a-8a. One

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[1] Kansas taxpayers must file their state tax returns under the same filing status as they use on their Federal income tax return. Kan. Stat. Ann. §§ 79-32,115(b)-(e); 79-32,121 (1989).

set of rate schedules applied only to married taxpayers who elected to file joint returns; the other set of schedules applied to all other, individual, filers. *Id.* The rates applicable to the combined incomes of married persons filing jointly were somewhat lower than the rates applicable to individual filers — for instance, in tax year 1995, a married couple with $20,000 each in Kansas taxable income would pay 3.5% income tax on the first $30,000 of their income ($1,050), plus 6.25% tax on the last $10,000 of their income ($625), for a total of $1,675. If the couple were unmarried (or married but electing to file separately) with $20,000 each in Kansas taxable income, each would pay 4.4% income tax on their $20,000 in income ($880 each), for a total of $1,760 — $85 more than two married persons filing jointly. If one of the couple had $40,000 in Kansas taxable income, and the other none, their Kansas income tax, if married filing jointly, would still be $1,675, but if they filed individually would be $2,405 — $730 more. The differences generally became greater as the taxpayers' incomes increased.

Proceedings In The District Court. On April 14, 1993, petitioner Peden brought this suit against respondents in the Shawnee County (Kansas) District Court, claiming that the rate differentiation between married, joint-filing taxpayers and all other taxpayers violated both the Equal Protection Clause and Article 11, § 2 of the Kansas Constitution.[2] Pet. App. 8a-9a.

After a series of procedural rulings by the district court (Pet. App. 9a-10a), Peden brought a motion for summary judgment. In that motion, Peden urged that KITA's distinction between

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[2] Article 11, § 2 of the Kansas Constitution provides that "[t]he state shall have power to levy and collect taxes on incomes from whatever source derived, which taxes may be graduated and progressive." The Kansas Supreme Court has held that the rational basis test applicable under the Federal Equal Protection Clause also applies under this state constitutional provision. *Missouri Pac. R.R. v. McDonald,* 486 P.2d 1347, 1353 (Kan. 1971), *aff'd,* 493 P.2d 280 (Kan. 1972); *Hartman v. State Comm'n of Rev. and Taxation,* 187 P.2d 939, 946 (Kan. 1947).

married taxpayers filing jointly and individual-filing taxpayers ran afoul of the Equal Protection Clause under the rational basis test. Record Vol. I, p. 134; *see also* Pet. 8. Peden also disclaimed any theory of heightened Equal Protection Clause scrutiny:

> *In the present case, the appropriate constitutional standard of review* for determining whether the Kansas statutory scheme violates equal protection guarantees *is the rational basis test.* The law is clear that, unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, equal protection only requires that a classification rationally further a legitimate state interest. . . . *Plaintiff is not alleging that the Kansas income tax rate classification between unmarried and married taxpayers impinges on a fundamental right or categorizes on the basis of an inherently suspect classification.*

Record Vol. I, p. 130 (emphasis added) (citations omitted). Peden relied entirely on legal argument in support of his motion for summary judgment; he submitted no evidence to support that motion, nor did he seek an evidentiary hearing.

The State opposed Peden's motion for summary judgment and moved for summary judgment in its own right. *See* Record Vol. I, pp. 151-66. The State urged that the statutory differentiation between married joint-filing taxpayers, and taxpayers filing individually, was in fact supported by several rational bases, including, *inter alia,* (1) promoting marriage in the State of Kansas, (2) alleviating the additional financial burdens felt by married couples, and (3) easing the State's administrative costs by encouraging the filing of a joint tax return whenever possible. The State pointed out that similar distinctions between married and unmarried taxpayers have been upheld both in the Federal income tax system and in at least one state income tax code.[3] While there

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[3] *See, e.g., Druker v. Commissioner of Internal Revenue*, 697 F.2d 46, 50-51 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) ("marriage

was no difference between the tax percentage rates applicable in those cases, the effective tax rates differed because only married taxpayers were allowed to combine their incomes and have their combined incomes taxed as a unitary whole, in different income brackets.

Five days after hearing oral argument, the Shawnee County District Court granted Peden's motion for summary judgment, and denied the State's motion, in a short opinion devoid of citation. Pet. App. 41a-44a. The district court ostensibly utilized a rational basis test — i.e., "(1) whether there is a legislative purpose for the classification, and (2) whether the classification rationally furthers that legislative purpose." Pet. App. 42a-43a.

The district court did not take issue with the legitimacy of the State's asserted legislative purposes, but it concluded that the State's classification did not rationally further any of those purposes. The district court rejected the assertion that "the public policy of the State of Kansas promotes marriage through its tax structure" as "almost fanciful when analytically examined." *Id.* It rejected the possibility that "married couples have a greater economic burden" as "highly speculative and subject to a great deal of question and uncertainty." *Id.* And it similarly rejected "ease of administration" as a rational basis for the disparity, finding such a rationale "speculative and conjectural." *Id.* On this reasoning, the district court declared the Kansas income tax structure unconstitutional. *Id.*

Proceedings In The Kansas Supreme Court. The State appealed the district court's judgment to the Supreme Court of Kansas, urging that the district court had misunderstood and misapplied the rational basis test in striking down the Kansas income tax structure. The State argued that, had the district court

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penalty"); *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978) (same); *Kellems v. Commissioner of Internal Revenue*, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973) ("singles penalty"); *Sowders v. Oklahoma Tax Comm'n*, 552 P.2d 698 (Okla. 1976) (same).

properly understood and applied the rational basis test, it would have found that the tax structure was supported by several rational bases, including (1) the promotion and preservation of marriage, (2) the alleviation of financial burdens generally associated with marriage, (3) the alleviation of a specific financial burden — the Federal income tax code's "marriage penalty" — that is associated with marriage of dual income taxpayers, and (4) encouraging taxpayers who can file joint returns to do so, in order to lower the State's administrative costs.

Petitioners, as appellees below, did not dispute that Kansas has legitimate interests in favoring marriage, alleviating the financial burdens associated with marriage, alleviating the Federal marriage penalty, and encouraging joint returns. Instead, their arguments rested entirely upon their claim that the impact of the tax rate schedules on those interests was unproven and that the structure of the tax rate schedules was not adequately tailored to further these legitimate goals. Petitioners' arguments in the Kansas Supreme Court, like their arguments in the district court, relied entirely on a rational basis analysis.

On December 20, 1996, a unanimous Kansas Supreme Court reversed the district court's judgment. Noting that "the legislature possesses the greatest freedom of classification in the area of taxation" (Pet. App. 28a, *citing Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940)), the court concluded that the classification drawn by the Kansas legislature was reasonable and therefore constitutional under the Equal Protection Clause's rational basis test. Based upon Kansas statutes and case law, and upon a series of empirical studies regarding the benefits of marriage to the participants, children, and society as a whole, the Court concluded that "the encouragement of marriage is a valid state interest." Pet. App. 35a. The court further concluded that "it is rational for the State to speculate that favorable tax treatment for married taxpayers in the form of lower rates will encourage single taxpayers to get married and stay married, thereby fulfilling a valid state objective." Pet. App. 37a.

The court rejected petitioners' "extreme critique" (Pet. App. 28a) that "KITA is not rationally related to the valid state interest of encouraging marriage because there is no proof that lower tax rates for married taxpayers will actually entice any singles to get married." Pet. App. 35a. It called petitioners' argument "unpersuasive because the State is not required to come forward with *data* that the tax rates are rationally related to the valid state interest of encouraging marriage." Pet. App. 36a. The court explained the rational basis standard:

> As the State points out, "a legislative choice is not subject to courtroom factfinding and may be based on rational *speculation* unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). (Emphasis added.) It is certainly a rational speculation to assume that imposing a lower tax rate on married taxpayers will entice singles to get married and encourage married couples to stay together.

Pet. App. 36a. The court noted that "[m]any tax benefits are based on the rationale that they will entice a taxpayer to behave in a certain way," *id.*, and gave several examples of tax provisions that encourage certain beneficial behaviors. Pet. App. 37a.[4] The court ultimately held that "it is rational for the state to speculate that favorable tax treatment for married taxpayers in

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[4] "For instance," the court explained:

> Congress provides tax benefits to charitable organizations to "encourage the development of private institutions that serve a useful public purpose." *Bob Jones University v. United States*, 461 U.S. 574, 587-88, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983). To encourage home ownership, Congress allows deductions for mortgage interest and related costs regardless of the taxpayer's income level or marital status. 26 U.S.C. § 163(h)(2)(D), (h)(3) (1994). To encourage saving, Congress allows for tax-deferred IRAs and 401(k) plans. 26 U.S.C. § 401(k) (1994); 26 U.S.C. § 408 (1994).

Pet. App. 37a.

the form of lower rates will encourage single taxpayers to get married and stay married." Pet. App. 36a-37a.

The court further explained that it was petitioners' burden, not the State's, to "'negative every conceivable basis which might support'" the rationality of the legislative classification. Pet. App. 37a (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. at 315). Petitioners had failed to satisfy this burden, the court explained, because they had

> not come forward with any data to negate this conceivable basis [of encouraging marriage] and prove that lower tax rates for married taxpayers do not in fact encourage single taxpayers to marry. . . . It is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married.

Pet. App. 37a-38a. In the Kansas Supreme Court's view, it was fatal to petitioners' constitutional argument that "there is no data put forth by Peden to disprove this speculation." Pet. App. 39a.

The court noted that "even though the State is not required to come forward with data supporting its rational basis," there was in fact some evidence "indicating that lower tax rates for married taxpayers do in fact encourage singles to marry." Pet. App. 38a.[5] The court also held that "the lower Kansas tax rates for married couples may counteract the federal marriage penalty to some degree and prevent couples from being discouraged to marry." Pet. App. 37a-38a. The Kansas Supreme Court thus

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[5] The court cited an opinion authored by Judge Friendly, in which the federal income tax code's "marriage penalty" in fact caused a couple to divorce by their own admission, *Druker v. Commissioner of Internal Revenue*, 697 F.2d at 50, as well as an opinion from the former Court of Claims which concluded that the marriage penalty "[m]ore often . . . changes the relative attraction of different prospective spouses for the tax-minded individual wishing to marry," and "[f]or many . . . provides an incentive to marry." Pet. App. 38a (quoting *Mapes v. United States*, 576 F.2d at 901).

held that the state's income tax structure was constitutional, and reversed the judgment of the district court. Pet. App. 39a.

Subsequent Developments. Since the decision of the Kansas Supreme Court in this case, the Governor of Kansas proposed, and the Kansas legislature has now passed, amendments to KITA which, over a three-year period, remove the tax rate differential and lower the rates of single taxpayers to match those rates paid by married Kansans.[6] The Governor of Kansas signed the bill into law on April 4, 1997. Section 13 of House Bill 2031, which contains these amendments, is attached as an appendix to this brief. App. 1a-4a.

REASONS FOR DENYING THE WRIT

Petitioners have shown no basis for certiorari. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification," *Madden v. Kentucky,* 309 U.S. 83, 87-88 (1940), and the Kansas legislature did not transgress the limits of that broad freedom in taxing married, joint income tax filers differently than all other, individual filers. The Kansas Supreme Court correctly applied well-established equal protection principles in upholding that income tax structure. There is no conflict with any decision of this or any other court. This unexceptional application of settled law does not merit this Court's review.

In all events, the issue presented by the petition is not likely to recur. Petitioners' challenge to the Kansas income tax structure is, as petitioners repeatedly stress, based upon the supposedly "unique" features of the statute.[7] The issue is thus unlikely to

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[6] While the rates will be the same, the maximum rate applies at a lower income level in the case of individual taxpayers than in the case of married taxpayers filing jointly. Petitioners have not argued that this distinction would be unconstitutional.

[7] As discussed below, the Kansas statute — which provides lower tax percentage rates for married taxpayers filing jointly — is in fact indistinguishable in principle from federal and state income tax statutes that provide lower effective tax rates for married taxpayers through

occur in any other state. Nor is it likely to recur in Kansas: the income tax structure at issue has now been repealed by the Kansas legislature. Certiorari should be denied.

I. THE DECISION BELOW WAS A CORRECT APPLICATION OF WELL-ESTABLISHED EQUAL PROTECTION CLAUSE PRINCIPLES

The Kansas Supreme Court applied well-established and uncontroversial equal protection principles to conclude that the statutory distinction between married, joint-filing taxpayers and individual filers was a rational means for furthering the state's concededly legitimate interest in encouraging marriage.[8] The court concluded that it was rational for a legislature to "speculate that lower tax rates for married taxpayers will entice singles to marry and stay married" (Pet. App. 39a), even in "the absence of legislative history concerning the disparate tax rates." Pet. App. 22a.

This was hardly an exceptional holding. It is both appropriate and common for a government to treat married couples and unmarried individuals differently, for purposes of taxation and otherwise. The Federal tax code, for instance, allows only married people to benefit from income-splitting — combining their incomes on a single return and having their combined incomes taxed as a whole. 26 U.S.C. § 6013 (1994), *as amended by* Pub. L. No. 104-168, 110 Stat. 1459 (1996). At the same time, however, the rates for married taxpayers increase more rapidly than the rates for single taxpayers as income increases.[9]

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income-splitting mechanisms.

[8] Petitioners have never disputed, nor do they now dispute the Kansas Supreme Court's holding "that the encouragement of marriage is a valid state interest." Pet. App. 35a. Indeed, the State of Kansas has long recognized "a public policy in fostering, protecting, and encouraging marriage." Pet. App. 31a-32a (citing cases and statutes).

[9] Thus, under the Federal system, a married joint-filing couple pays 15% tax on the first $36,900 of their taxable income, then 28% on the amount up to $89,150, then 31% on the amount up to $140,000, and so

In some circumstances, married taxpayers benefit significantly from the federal tax structure. For example, a married couple with $40,000 in federal taxable income, filing jointly, would pay $6,403 in federal income tax (26 U.S.C. § 1(a)); if one of the couple earned all $40,000, their federal taxes, computed on the basis of the rates applicable to unmarried individuals other than surviving spouses and heads of household, would be $8,327 — $1,924 more than married persons filing jointly. 26 U.S.C. § 1(c).[10]

Federal tax law favors married people in other ways as well. Federal gift taxes paid by a decedent spouse may be credited on the surviving spouse's tax return. 26 U.S.C. § 2001 (1994). Surviving spouses are qualified to take estate tax deductions. 26 U.S.C. § 2056 (1994). In many other contexts beyond the tax code, too, Federal law favors marriage (*see generally Turner v. Safley*, 482 U.S. 78, 96 (1987)), as do state laws.[11] The Kansas Supreme Court's holding was wholly consistent with these well-established distinctions between married and non-married persons.

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on. A single, individual filer pays the same marginal tax rates of 15%, 28%, and 31%, but the higher tax rates become effective at significantly lower levels of taxable income — $22,100, $53,500, and $115,000. *Compare* 26 U.S.C. § 1(a) (1994) with 26 U.S.C. § 1(c) (1994).

[10] In situations where both members of the couple have similar amounts of taxable income, the tax rates applicable to married persons filing jointly result in a so-called "marriage penalty." *See, e.g., Druker v. Commissioner of Internal Revenue*, 697 F.2d at 49.

[11] Kansas, for example, distinguishes between married and unmarried persons. The State of Kansas sanctions marriage ceremonies (Kan. Stat. Ann. § 23-101 (1996 Supp.), 23-104a (1996 Supp.), § 23-116 (1995)); recognizes common-law marriages (*Chandler v. Central Oil Corp.*, 853 P.2d 649, 652 (1993)); recognizes a marital privilege to protect confidentiality (Kan. Stat. Ann. § 60-428 (1994)); allows spouses to pursue wrongful-death claims (Kan. Stat. Ann. § 60-1901 *et seq.* (1994)) and loss-of-consortium claims (Kan. Stat. Ann. § 23-205 (1995)); and provides for intestate succession for surviving spouses. Kan. Stat. Ann. § 59-504 (1989).

Petitioners nonetheless offer five reasons, all of them unavailing, why the Kansas tax code results in a violation of equal protection. *First,* petitioners say (Pet. 16) that the taxing classification is overbroad because marriage is not available to "many persons," such as minor children and Catholic priests. This is not an appropriate objection under the rational basis test. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). *See also New York Transit Auth. v. Beazer,* 440 U.S. 568, 590-92 (1979) (transit authority's blanket ban on hiring of methadone users had a rational basis even though some methadone users would not pose a safety risk); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314-16 (1976) (*per curiam*) (retirement age of 50 for uniformed police officers "rationally related to the State's objective" of "protect[ing] the public by assuring physical preparedness of its uniformed police," even though some over-50 officers would be physically capable). As in *Weinberger v. Salfi,* 422 U.S. 749 (1975), the Kansas legislature "could rationally have concluded . . . that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777.

Second, petitioners urge (Pet. 17) that Kansas officials have disclaimed the possibility that the "true purpose" of the tax rate distinctions was to favor the state's interest in encouraging marriage. In making this argument, petitioners rely upon a memorandum, authored by then-Secretary of Revenue Nancy Parrish, in which the Secretary supposedly "admit[ted] that the true purpose behind the rate discrimination against singles was to generate a fixed target of tax dollars from singles." Pet. 17. Of course, Secretary Parrish's memorandum did not "admi[t]" that this was the sole or "true purpose" behind the statute. A policy of "retain[ing] the same proportional burden between married individuals filing jointly and single filers" in amending the legislation (Pet. App. 53a) is fully consistent with encouraging marriage through lower tax rates. Moreover, since the legislature's motivations are "entirely irrelevant" to the equal protection

analysis, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), it is difficult to understand how the views of the Secretary of Revenue could be any more relevant.[12]

Third, petitioners suggest (Pet. 24-25) that "the Kansas income tax law conflicts with the income tax laws of the federal government and all other states," none of which "charges excess income tax rates to unmarried taxpayers." Pet. 25 n.9 (citing statutes). In other words, petitioners say that those tax codes merely impose the same tax rates upon different brackets of taxable income, while the Kansas statute under attack imposes different tax rates upon different tax brackets. *See* Pet. i (question presented). There can be no constitutional difference to such a distinction: The Federal government, and most states, tax married couples filing jointly differently than individual filers, often benefitting married taxpayers. Thus, under the Federal tax code, *only* married people may combine their incomes and file a joint income tax return. 26 U.S.C. § 6013. This distinction "according to marital status is not unreasonable." *Faraco v. Commissioner of Internal Revenue,* 261 F.2d 387, 389 (4th Cir. 1958), *cert. denied,* 359 U.S. 925 (1959). *See also Johnson v. United States,* 422 F. Supp. 958, 971 (N.D. Ind. 1976), *aff'd,* 550 F.2d 1239 (7th Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978). Whether accomplished by different rates, or by different brackets, or a combination of both, the result in each case is dif-ferent treatment of married couples, and lower tax rates for mar-ried taxpayers, but in no case is there a violation of equal protection.

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[12] Citing *U.S.D. 229 v. State of Kansas*, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 115 S. Ct. 2582 (1995), petitioners make the similar claim (Pet. 17) that the Kansas Supreme Court has found that "everything in the [1992 income tax] Act was related to public education — not marriage." The Kansas Supreme Court's *U.S.D. 229* decision did not hold that the tax rates were unrelated to the state's valid interest in encouraging marriage, as petitioners suggest; moreover, petitioners did not see fit to raise this argument in the Kansas Supreme Court below. *See Adams v. Robertson,* 117 S. Ct. 1028, 1029 (1997) (*per curiam*).

Fourth, petitioners argue that "[m]arriage is not simply a person's 'behavior' that can be turned on and off by manipulating the provisions of the Kansas income tax code," so that "[i]n reality, there is no link between the Kansas tax rate disparity and the behavior of marriage." Pet. 16. These are but conclusory statements that are both unsupported by the record and contradicted both by case law and by statistical research.[13] In the district court, petitioners — who had the burden of showing that the distinction lacked a rational basis — never endeavored to prove their assertion that tax rates do not influence marital behavior. They chose instead to rely solely upon attorney argument and rhetorical questions — a strategy they now repeat in the petition. *Compare* Pet. 16-18. Such rhetoric was, and is, no substitute for the required evidentiary showing that Kansas' income tax code lacked a rational basis.

Fifth, petitioners claim (Pet. 20-23) that the Kansas Supreme Court erred by failing to apply "heightened scrutiny" in light of the income tax code's interference with "freedom of personal choice in matters of marriage." This case was litigated by both sides on the theory of rational basis review; petitioners never asked the courts below to apply heightened scrutiny; and indeed, contrary to petitioners' claim that this issue was "preserved" by their complaint (Pet. 21 n.8), they *expressly disclaimed* reliance upon heightened scrutiny in their later summary judgment motion. *See* Record Vol. I, p. 130 (quoted *supra* at p. 3). As in *Heller v. Doe,*

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[13] *E.g., Druker v. Commissioner of Internal Revenue,* 697 F.2d at 50 ("marriage penalty" caused couple to divorce); *Mapes v. United States,* 576 F.2d at 901 ("the elevated tax burden" created by the federal marriage penalty "might in fact dissuade some couples from entering into matrimony," but "[f]or many it provides an incentive to marry"); Sjoquist & Walker, *The Marriage Tax and the Rate and Timing of Marriage,* 48 Nat'l Tax J. 547, 556 (1995) (concluding, from statistical analysis, "the [federal] marriage tax has a significant negative effect on the timing of marriages" and "causes individuals to postpone marriage" to some degree).

> it would be inappropriate for us to apply [heightened scrutiny] here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.

509 U.S. 312, 319 (1993). *See also Adams v. Robertson,* 117 S. Ct. 1028, 1029 (1997) (*per curiam*) (this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision").

Even if petitioners had not disclaimed heightened scrutiny, it would not have been appropriate in this case. Only statutes that prohibit or "significantly interfere" with the right to marry are subject to heightened scrutiny. *Zablocki v. Redhail,* 434 U.S. 374, 386-87 & n.12 (1978). As several courts have held, because differential tax rates on single or married persons neither prohibit nor significantly interfere with marital decisions, the rational basis test applies to such distinctions in income tax codes. *See, e.g., Druker v. Commissioner of Internal Revenue,* 697 F.2d 46, 50 (2d Cir. 1982) (Friendly, J.), *cert. denied,* 461 U.S. 957 (1983); *Mapes v. United States,* 576 F.2d 896, 901 (Ct. Cl.), *cert. denied,* 439 U.S. 1046 (1978). Petitioners cite no contrary authority. And certainly the difference in income tax involved here — at most a few hundred dollars at the $40,000 income level — would not, as petitioners suggest, prohibit or "significantly interfer[e]" with a person's "freedom of personal choice in matters of marriage." Pet. 21-22. To the contrary, "while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual." *Druker,* 697 F.2d at 50. *See also Mapes,* 576 F.2d at 901.

In sum, there is nothing about the Kansas Supreme Court's proper application of well-established law warranting certiorari in this case.

II. THE KANSAS SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS OR ANY OTHER COURT

Petitioners allege, in the heading of their first argument, that the Kansas Supreme Court "[m]isapplies" rational basis review as recently outlined in *FCC v. Beach Communications, Inc.*, 508 U.S. 307. Pet. 13. Despite that claim, petitioners make no effort, anywhere in their petition, to show how that decision was in fact "[m]isapplie[d]" by the Kansas Supreme Court.

Petitioners say only that the Kansas Supreme Court erred by "glean[ing] from *FCC v. Beach* that 'rational speculation' brings rational basis inquiry to an end." Pet. 14. That was hardly a "misapplication" of *Beach Communications*, which held that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,' . . . [and] because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315. Or, "[i]n other words, a *legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Id.* (emphasis added). Petitioners' real complaint is not that the decision conflicts with *Beach Communications* but rather that *Beach Communications* was, in their view, wrongly decided. But the unexceptional propositions articulated in *Beach Communications* and followed by the Kansas Supreme Court in this case (Pet. App. 36a-37a) are supported by a long line of this Court's Equal Protection Clause decisions, *e.g.*, *Heller v. Doe*, 509 U.S. at 319-20; *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

Petitioners also cite this Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), even though they do not allege that the decision below conflicts with *Romer*. *See* Pet. 14-15. In

Romer, this Court concluded that there was an inadequate link (or nexus) between Colorado's proffered justifications for a state constitutional amendment, and the disability imposed by that amendment — a prohibition upon any governmental action designed to protect homosexual persons. 116 S. Ct. at 1629. The court below correctly understood that *Romer* found an equal protection violation because "there was not a close enough nexus between the amendment and the purported valid state interests justifying the amendment." Pet. App. 25a. But, as the Kansas court held, no such lack of nexus exists with respect to the Kansas income tax code: "It is reasonable to speculate that the Kansas income tax rates will provide some additional, if not great, incentive for taxpayers to marry and stay married." Pet. App. 38a.

The Kansas Supreme Court's decision was also in accord with the only two lower court decisions to have previously addressed the constitutionality of an income tax structure which favors married, joint filers over single persons — *Kellems v. Commissioner of Internal Revenue,* 58 T.C. 556 (1972), *aff'd per curiam,* 474 F.2d 1399 (2d Cir.), *cert. denied,* 414 U.S. 831 (1973), and *Sowders v. Oklahoma Tax Comm'n,* 552 P.2d 698 (Okla. 1976).[14] Petitioners fail to cite, let alone distinguish, either case.

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[14] In *Kellems v. Commissioner of Internal Revenue,* the unmarried petitioner alleged a violation of equal protection because her income, taxed as a single person, resulted in an income tax of $10,726.34; had her same income been taxed on the schedules applicable to married persons filing jointly, her tax would have been only $7,568.26. 58 T.C. at 557 n.1. The Tax Court rejected Ms. Kellems' argument, and upheld the distinction as rational, because "it is conceivable Congress believed that married persons generally have greater financial burdens than single persons." *Id.* at 559. In *Sowders v. Oklahoma Tax Comm'n,* the Oklahoma Supreme Court upheld a similar distinction in favor of married joint income tax filers on the same reasoning adopted by the Tax Court in *Kellems.* 552 P.2d at 700.

In sum, the decision below conflicts with no decision of this Court or any other court, it is entirely consistent with prior lower-court decisions presenting similar issues, and it does not merit this Court's review.

III. THE SUPPOSEDLY "UNIQUE" QUESTION PRESENTED BY THIS CASE IS NOT LIKELY TO RECUR

Petitioners themselves claim that the precise question presented by this case is not likely to recur in any other state. At every turn, petitioners characterize the distinctions drawn by the Kansas income tax structure at issue as "unprecedented" (Pet. 4, 26), "unique" (Pet. 19, 23), and like "[n]o other." Pet. 25. While this is largely hyperbole on petitioners' part, given that governments routinely — and properly — treat married couples and single individuals differently (see pp. 9-10, above), it only confirms that certiorari is unwarranted on this question. This Court's certiorari review is reserved for questions that are "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Under petitioners' theory, any decision in this case would not be likely to have a significant effect upon future cases in other jurisdictions, and for that reason is unworthy of this Court's review.

The question is not likely to recur in Kansas, either. As noted above (p. 8), both the Kansas Senate and House have now passed, for other than constitutional reasons, and the Governor of Kansas has signed, legislation which will amend KITA and remove the distinction in tax rates that petitioners challenged in the Kansas courts below. This Court should not grant certiorari to determine the constitutionality of a defunct provision of the Kansas income tax code.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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April 14, 1997

APPENDIX

HOUSE BILL No. 2031

AN Act enacting the education and tax reform act of 1997; amending K.S.A. 72-6414, 79-4505 and 79-4508 and K.S.A. 1996 Supp. 72-6407, 72-6410, 72-6412, 72-6431, 72-6438, 72-6441, 72-6442, 79-32,110, 79-4502 and 79-5105 and repealing the existing sections; also repealing K.S.A. 79-4520 and K.S.A. 1996 Supp. 72-6412a, 72-6431a, 72-6442a, 72-8191 and 72-8192.

Be It Enacted By The Legislature Of The State Of Kansas:

* * * *

Sec. 13. On July 1, 1997, K.S.A. 1996 Supp. 79-32,110 shall be and is hereby amended to read as follows: 79,32,110. (a) RESIDENT INDIVIDUALS. Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married Individuals Filing Joint Returns.*

If the taxable income is:	The tax is:
Not over $30,000	3,5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All Other Individuals.*

(A) For tax year 1997:

If the taxable income is:	The tax is:
Not over $20,000	4.1% of Kansas taxable income

Over $20,000 but not over $30,000	$820 plus 7.5% of excess over $20,000
Over $30,000	$1,570 plus 7.75% of excess over $30,000

(B) For tax year 1998:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.75% of excess over $15,000
Over $30,000	$1,537.50 plus 7.75% of excess over $30,000

(C) For tax year 1999:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.25% of excess over $15,000
Over $30,000	$1,462.50 plus 7.45% of excess over $30,000

(D) For tax year 2000, and all tax years thereafter:

If the taxable income is:	The tax is:
Not over $15,000	3.5% of Kansas taxable income
Over $15,000 but not over $30,000	$525 plus 6.25% of excess over $15,000

Over $30,000	$1,462.50 plus 6.45% of excess over $30,000

(b) NONRESIDENT INDIVIDUALS. A tax is hereby imposed upon the Kansas taxable income of every nonresident individual, which tax shall be an amount equal to the tax computed under subsection (a) as if the nonresident were a resident multiplied by the ratio of modified Kansas source income to Kansas adjusted gross income.

(c) CORPORATIONS. A tax is hereby imposed upon the Kansas taxable income of every corporation doing business within this state or deriving income from sources within this state. Such tax shall consist of a normal tax and a surtax and shall be computed as follows:

(1) The normal tax shall be in an amount equal to 4% of the Kansas taxable income of such corporation; and

(2) The surtax shall be in an amount equal to 3.35% of the Kansas taxable income of such corporation in excess of $50,000.

(d) FIDUCIARIES. A tax is hereby imposed upon the Kansas taxable income of estates and trusts at the rates provided in paragraph (2) of subsection (a) hereof.

* * * *

Sec. 20. This act shall take effect and be in force from and after its publication in the Kansas register.

I hereby certify that the above BILL originated in the HOUSE, and passed that body February 21, 1997

HOUSE concurred in
SENATE amendments March 21, 1997

/s/ Tim Shallenburger
Speaker of the House.

/s/ Janet E. Jones
Chief Clerk of the House.

Passed the SENATE
as amended March 20, 1997

/s/ Dick Bond
President of the Senate.

/s/ Pat Saville
Secretary of the Senate.

APPROVED April 4, 1997

/s/ Bill Graves
Governor.